ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2003

Mr. John Knight
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OR2003-8611

Dear Mr. Knight:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190990.

The City of Lubbock (the "city") received a request for "copies of all health bids for plan year 2002 & 2003 proposals from all insurance companies and TPA's [sic]." You state that some information has been released to the requestor. You claim that other requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code.[1] Additionally, you have notified eighteen interested third parties of the request for information pursuant to section 552.305 of the Government Code.[2] *See* Gov't

[1]Although you also claim that the requested information may be withheld under section 552.305, this section is not an exception to public disclosure. Rather, this section is a procedural provision permitting an interested third party to submit to the attorney general reasons why requested information should not be released. Gov't Code § 552.305; see Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Thus, the city may not withhold any of the submitted information under section 552.305.

[2]The following third parties received notice pursuant to section 552.305: USI Administrators, Inc.–CBCA, Inc.; TML Intergovernmental Employee Benefits Pool; Blue Cross Blue Shield; Ameritas Life Insurance Corporation; United Healthcare; ICON Benefit Administrators, Inc.; United Provider Services; Systemed, L.L.C.; HealthSmart Preferred Care, Inc.; Wausau Benefits, Inc.; Eckerd Health Services; UNICARE Life and Health; AdvancePCS; MaxorPlus, Ltd.; Southwest Life & Health Insurance Company; Health

Code § 552.305; Open Records Decision No. 542 (1990). The city has submitted the information at issue to this office. We also received correspondence from Eckerd Health Services ("Eckerd"), HealthSmart Preferred Care, Inc. ("HealthSmart"), ICON Benefit Administrators II. L.P. ("ICON"), AdvancePCS ("Advance"), and Systemed, L.L.C. ("Systemed"). We have considered all arguments and have reviewed the submitted information.

Initially, we note that this office previously issued Open Records Letter No. 2003-1563 (2003) in response to a request for a decision concerning some of the same information at issue in the current request. In Open Records Letter No. 2003-1563, we concluded the city had to withhold some of the submitted information related to Advance and Eckerd under section 552.110 of the Government Code. Based on your arguments and our review of the information and briefs submitted by both Advance and Eckerd, we find the city has met the criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001).[3] *See* Open Records Decision No. 673 (2001). Therefore, we conclude the city must release or withhold the submitted information related to Advance and Eckerd in accordance with Open Records Letter No. 2003-1563.

Next, we address the city's argument under section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The city asserts section 252.049 of the Local Government Code to protect certain information responsive to the request. Section 252.049 provides as follows:

> (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
>
> (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Administration Services, Inc.; Walgreens Health Intiatives; and Delta Dental Insurance Company.

[3]The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Public Information Act (the "Act"); and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

Local Gov't Code § 252.049. This provision merely duplicates the protection section 552.110 of the Government Code provides to trade secret and commercial or financial information. The city does not demonstrate that any of the requested information qualifies as either trade secret or confidential commercial or financial information under section 552.110. Thus, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.

The city and Systemed both claim that section 552.104 of the Government Code is applicable in this instance. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects the interests of governmental bodies, not the proprietary interests of private parties. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Therefore, we do not consider Systemed's claim under section 552.104. Section 552.104 protects a governmental body's interests in competitive bidding situations and requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Furthermore, section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978). The city states that the relevant contract at issue has been awarded. Thus, as the information at issue relates to a situation in which a contract has been awarded, section 552.104 is not applicable in this instance.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, USI Administrators, Inc.–CBCA, Inc.; TML Intergovernmental Employee Benefits Pool; Blue Cross Blue Shield; Ameritas Life Insurance Corporation; United Healthcare; United Provider Services; Wausau Benefits, Inc.; UNICARE Life and Health; MaxorPlus, Ltd.; Southwest Life & Health Insurance Company; Health Administration Services, Inc.; Walgreens Health Initiatives; and Delta Dental Insurance Company have not submitted to this office their reasons explaining why the city should not release their information. Therefore, these thirteen third parties have provided us with no basis to conclude that any has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We next note that one of the third parties argues that the submitted information is designated as proprietary and confidential trade secret information. However, information is not

confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract"). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

HealthSmart, ICON, and Systemed argue that portions of their information are excepted under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;

> (2) the extent to which it is known by employees and others involved in [the company's] business;
>
> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (4) the value of the information to [the company] and to [its] competitors;
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> (5) the amount of effort or money expended by [the company] in developing this information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Having reviewed the submitted briefs, we conclude that Systemed has established that portions of its information are excepted under section 552.110. We have marked the information that the city must withhold. However, we find that Systemed has failed to demonstrate the applicability of either aspect of section 552.110 to its remaining information. *See, e.g.,* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, pursuant to section 552.110, the city must withhold only the information we have marked related to Systemed.

HealthSmart and ICON (collectively "HealthSmart/ICON") also make arguments under section 552.110. Although the companies' arguments address a proposal that is different

than the one that the city submitted to this office for review, the submitted proposal includes information that is substantially similar to the information for which HealthSmart/ICON has submitted arguments. We have therefore applied HealthSmart/ICON's arguments to the submitted information and find that the companies have established that portions of the submitted information are excepted under section 552.110(b) of the Government Code. This information, which we have marked, includes the following: (1) complaints and grievance policy and procedures, (2) credentialing policy and procedures, (3) sample provider contracts, (4) information related to *Smart Physicians*, (5) State of Texas Savings Report and National Savings Report, (6) disease management overview, (7) case management process, (8) utilization management sample reports, (9) utilization management policy and procedures, (10) quality improvement policy and procedures, and (11) certain claims data and zip code analysis data. The city must withhold this information, which we have marked, related to HealthSmart and ICON. We find, however, that HealthSmart/ICON has not established that the remaining submitted information is excepted under either prong of section 552.110 of the Government Code. Therefore, the city must only withhold the information we have marked.

Finally, we note that portions of the submitted information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

To summarize, we conclude (1) the city must release or withhold the submitted information related to Advance and Eckerd in accordance with Open Records Letter No. 2003-1563, and (2) the city must withhold the information we have marked related to Systemed, HealthSmart, and ICON. The remaining information must be released in accordance with applicable copyright laws.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Sarah I. Swanson
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Open Records Division

SIS/lmt

Ref: ID# 190990

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